

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KAY L. WILSON,	)	
	)	No. CV-09-0254-CI
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION AND DENYING
	)	DEFENDANT'S MOTION FOR
MICHAEL J. ASTRUE, Commissioner	)	SUMMARY JUDGMENT
of Social Security,	)	
	)	
Defendant.	)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 9, 15.) Attorney Paul L. Clark represents Kay L. Wilson (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and **DENIES** Defendant's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff applied for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on October 6, 2004. (Tr. 151.) She alleged disability due to post-surgery bilateral knee pain with an onset date of May 15, 2002. (Tr. 150, 167.) After benefits were denied initially and on reconsideration, Plaintiff requested a hearing before an administrative law judge (ALJ). A hearing before ALJ Mary Bennett Reed was held on January 10, 2007. (Tr. 609-54.)

1 Plaintiff, who was represented by counsel, and vocational expert  
2 Debra Uhlenkott testified. (*Id.*) The ALJ denied benefits on March  
3 12, 2007, and the Appeals Council denied review. (Tr. 1-5, 16-26.)  
4 The instant matter is before this court pursuant to 42 U.S.C. §  
5 405(g).

#### 6 STANDARD OF REVIEW

7 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
8 court set out the standard of review:

9 A district court's order upholding the Commissioner's  
10 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
11 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
12 Commissioner may be reversed only if it is not supported  
13 by substantial evidence or if it is based on legal error.  
14 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
15 Substantial evidence is defined as being more than a mere  
16 scintilla, but less than a preponderance. *Id.* at 1098.  
17 Put another way, substantial evidence is such relevant  
18 evidence as a reasonable mind might accept as adequate to  
19 support a conclusion. *Richardson v. Perales*, 402 U.S.  
20 389, 401 (1971). If the evidence is susceptible to more  
21 than one rational interpretation, the court may not  
22 substitute its judgment for that of the Commissioner.  
23 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
24 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,  
26 resolving conflicts in medical testimony, and resolving  
27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
28 Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve  
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
supports more than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner. *Tackett*, 180  
F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in  
2 weighing the evidence and making the decision. *Browner v. Secretary*  
3 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
4 there is substantial evidence to support the administrative  
5 findings, or if there is conflicting evidence that will support a  
6 finding of either disability or non-disability, the finding of the  
7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
8 1230 (9<sup>th</sup> Cir. 1987).

#### 9 SEQUENTIAL EVALUATION

10 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
11 requirements necessary to establish disability:

12 Under the Social Security Act, individuals who are  
13 "under a disability" are eligible to receive benefits. 42  
14 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
15 medically determinable physical or mental impairment"  
16 which prevents one from engaging "in any substantial  
17 gainful activity" and is expected to result in death or  
18 last "for a continuous period of not less than 12 months."  
19 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
20 from "anatomical, physiological, or psychological  
21 abnormalities which are demonstrable by medically  
22 acceptable clinical and laboratory diagnostic techniques."  
23 42 U.S.C. § 423(d)(3). The Act also provides that a  
24 claimant will be eligible for benefits only if his  
25 impairments "are of such severity that he is not only  
26 unable to do his previous work but cannot, considering his  
27 age, education and work experience, engage in any other  
28 kind of substantial gainful work which exists in the  
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
the definition of disability consists of both medical and  
vocational components.

In evaluating whether a claimant suffers from a  
disability, an ALJ must apply a five-step sequential  
inquiry addressing both components of the definition,  
until a question is answered affirmatively or negatively  
in such a way that an ultimate determination can be made.  
20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
claimant bears the burden of proving that [s]he is  
disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
1999). This requires the presentation of "complete and  
detailed objective medical reports of h[is] condition from

1 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
2 404.1512(a)-(b), 404.1513(d)).

3 The Commissioner has established a five-step sequential  
4 evaluation process for determining whether a person is disabled. 20  
5 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
6 137, 140-42 (1987). In steps one through four, the burden of proof  
7 rests upon the claimant to establish a prima facie case of  
8 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d  
9 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant  
10 establishes that a physical or mental impairment prevents her from  
11 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),  
12 416.920(a). At step five, the burden shifts to the Commissioner to  
13 show that (1) the claimant can perform other substantial gainful  
14 activity; and (2) a "significant number of jobs exist in the  
15 national economy" which claimant can perform. 20 C.F.R. §§  
16 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,  
17 1498 (9<sup>th</sup> Cir. 1984).

#### 18 STATEMENT OF THE CASE

19 The facts of the case are set forth in detail in the transcript  
20 of proceedings and are briefly summarized here. Plaintiff was 29  
21 years old at the time of the hearing, had a ninth grade education  
22 and a high school equivalency degree. (Tr. 648.) She was unmarried  
23 with two young children, one of whom lived with her in a townhouse.  
24 (Tr. 624-25.) Plaintiff has past work experience as a nurse's  
25 assistant and home attendant. (Tr. 647.) She testified she could  
26 no longer work due to pain and limitations caused by post operative  
27 knee impairments and the effects of pain medication. (Tr. 615, 618,

1 636.)

2 **ADMINISTRATIVE DECISION**

3 ALJ Reed found Plaintiff met the insured status requirements  
4 for DIB through December 31, 2007. (Tr. 18.) At step one of the  
5 sequential evaluation, she found Plaintiff had made an unsuccessful  
6 work attempt after her alleged onset date, May 15, 2002, and thus  
7 had not engaged in substantial gainful activity since that date,  
8 *Id.* At steps two and three, she found Plaintiff had severe  
9 impairments of obesity, bilateral knee pain and high blood pressure,  
10 but the impairments, alone and in combination, did not meet or  
11 medically equal one of the listed impairments in 20 C.F.R., Appendix  
12 1, Subpart P, Regulations No. 4 (Listings). (Tr. 19-21.) At step  
13 four, she determined Plaintiff retained the residual functional  
14 capacity (RFC) to perform sedentary work. Specifically, she found  
15 Plaintiff could lift, carry, and/or push and pull less than 10  
16 pounds frequently and up to 10 pounds occasionally; sit for six  
17 hours in an eight-hour day with normal breaks; stand and/or walk up  
18 to two hours in an eight-hour day for 15 to 30 minutes at a time;  
19 handle and finger frequently; occasionally climb stairs and ramps;  
20 and should avoid stooping, walking on uneven surfaces, and climbing  
21 ropes, ladders and scaffolding. (Tr. 21-22.) In her discussion of  
22 the evidence, the ALJ found Plaintiff's subjective symptom testimony  
23 was not entirely credible. (Tr. 22-23.) Based on the RFC and VE  
24 testimony, the ALJ concluded Plaintiff could no longer perform her  
25 past work. (Tr. 24.) At step five, considering further VE  
26 testimony, the ALJ found there was a significant number of jobs in  
27 the national economy Plaintiff could still perform; therefore, she

1 had not been under a disability since the alleged onset date through  
2 the date of the decision denying benefits. (Tr. 25-26.)

### 3 ISSUES

4 The issue presented is whether the ALJ's decision is based on  
5 substantial evidence and free of legal error. Plaintiff argues the  
6 ALJ erred in assessing her credibility. She also argues the ALJ's  
7 step three finding that her condition does not meet or equal a  
8 Listing is not supported by substantial evidence and is based on  
9 legal error, e.g., improper rejection of her treating specialist's  
10 opinion. She also contends the matter should be remanded for  
11 medical expert testimony to establish an onset date. (Ct. Rec. 9.)

### 12 DISCUSSION

13 The Commissioner has promulgated a "Listing of Impairments"  
14 that are "so severe that they are irrebuttably presumed disabling,  
15 without any specific finding as to the claimant's ability to perform  
16 his past relevant work or any other jobs." *Lester v. Chater*, 81  
17 F.3d 821, 828 (9<sup>th</sup> Cir. 1995). If a claimant's impairment does not  
18 meet the criteria specified in the Listings, he or she is still  
19 disabled if the impairment equals a listed impairment. 20 C.F.R. §  
20 416.920(d). If a claimant has more than one impairment, the  
21 Commissioner must determine whether the combination of impairments  
22 is medically equal to any listed impairment. 20 C.F.R. §  
23 416.926(a). A claimant's symptoms "must be considered in  
24 combination and must not be fragmentized in evaluating their  
25 effects." *Lester*, 81 F.3d 821 at 829. A finding of medical  
26 equivalence must be based on medical evidence from acceptable  
27 medical sources only, i.e. licensed psychologists or physicians

1 designated by the Commissioner. 20 C.F.R. §§ 416.929(d)(3), .926  
2 (c),(d)

3 "Longstanding policy requires that the judgment of a physician  
4 or psychologist designated by the Commissioner on the issue of  
5 equivalence on the evidence before the administrative law judge . .  
6 . must be received into the record as expert opinion evidence and  
7 given appropriate weight." *Social Security Ruling (SSR) 96-6p*.<sup>1</sup>  
8 The Commissioner advises when the evidence suggests a judgment of  
9 equivalence may be reasonable and a medical judgment as to medical  
10 equivalence must be made by the ALJ, a medical expert must be  
11 called. *Id.* Remand for medical expert testimony and additional  
12 proceedings is warranted unless it is clear from the record that  
13 Plaintiff is disabled and no other issues are outstanding. *Benecke*  
14 *v. Barnhart*, 379 F.3d 587, 593 (9<sup>th</sup> Cir. 2004); *Lester*, 81 at 830,  
15 834; *Smolen v. Chater*, 80 F.3d 1273, 1291-92 (9<sup>th</sup> Cir. 1996); see  
16 also *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9<sup>th</sup> Cir. 1990).

17 Here, Plaintiff contends the opinion of her treating physician,  
18 H. Graeme French, M.D., that she met Listing 1.02 was improperly  
19 rejected by the ALJ, and if credited, she would be eligible for  
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21 <sup>1</sup> Social Security Rulings are issued to clarify the  
22 Commissioner's regulations and policy. They are not published in  
23 the federal register and do not have the force of law. However,  
24 under the case law, deference is to be given to the Commissioner's  
25 interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d  
26 1002 n.2 (9<sup>th</sup> Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3.  
27 (9<sup>th</sup> Cir. 1991).

1 disability benefits. The relevant criteria for Listing 1.02 are as  
2 follow:

3 *Major dysfunction of a joint(s) (due to any cause):*  
4 Characterized by gross anatomical deformity (e.g.,  
5 subluxation, contracture, bony or fibrous ankylosis,  
6 instability) and chronic joint pain and stiffness with  
7 signs of limitation of motions or other abnormal motion of  
8 the affected joints, and findings on appropriate medically  
9 acceptable imaging of joint space narrowing, bony  
10 destruction, or ankylosis of the affected joint(s).

11 With:

12 A. Involvement of one major peripheral weight-bearing  
13 joint (i.e. hip, knee, or ankle), resulting in inability  
14 to ambulate effectively as defined in 1.00B2b.

15 20 C.F.R. Pt. 404, Subpt. P, App.1, Section 1.02. The "inability to  
16 ambulate effectively" is defined as follows:

17 *To ambulate effectively*, individuals must be capable of  
18 sustaining a reasonable walking pace over a sufficient  
19 distance to be able to carry out activities of daily  
20 living. They must have the ability to travel without  
21 companion assistance to and from a place of employment or  
22 school. Therefore, examples of ineffective ambulation  
23 include, but are not limited to, the inability to walk  
24 without the use of a walker, two crutches or two canes,  
25 the inability to walk a block at a reasonable pace on  
26 rough or uneven surfaces, the inability to use standard  
27 public transportation, the inability to carry out routine  
28 ambulatory activities such as shopping and banking, and  
the inability to climb a few steps at a reasonable pace  
with the use of a single hand rail. The ability to walk  
independently about one's home without the use of  
assistive devices does not, in and of itself, constitute  
effective ambulation.

*Id.* at Section 1.00B2b.

23 In her appeal of ALJ's Reed's denial of benefits, Plaintiff  
24 presents a reasonable theory of medical equivalency based on the  
25 medical evidence, including a questionnaire completed by Dr. French  
26 in December 2005, six months after his last examination of Plaintiff  
27 prior to the administrative hearing. (Ct. Rec. 9 at 6; Tr. 341-46,



1 410-11, 644.) Plaintiff also submitted new evidence reviewed by the  
2 Appeals Council after the March 2007 ALJ hearing that includes  
3 medical evidence from Dr. French describing treatment and  
4 limitations caused by her knee surgeries.<sup>2</sup> (Tr. 416-608.)

5 The opinions of a treating physician are generally given more  
6 weight than other medical sources because they provide a  
7 longitudinal, detailed picture of a claimant's impairment. 20  
8 C.F.R. §§ 404.1527(d)(20, 416.927(d)(2). The record shows Dr.  
9 French, an orthopedic specialist, treated Plaintiff's knee condition  
10 between April 2004 and June 2005, and then from October 2007 through  
11 January 2009. In the December 2005 questionnaire, Dr. French  
12 checked off his opinions that Plaintiff met the criteria for Listing  
13 1.02. (Tr. 342-43.) The ALJ rejected this report because it did  
14 not establish the onset date and because the conclusion was  
15 inconsistent with the doctor's treatment notes. (Tr. 21.) He also  
16 found there was no evidence the claimant returned for treatment  
17 after June 2005 and no indication she wore a prescribed knee brace.  
18 (*Id.*, but see Tr. 204, 240 (indicating use of prescribed brace).)  
19 These reasons are not sufficiently "specific and legitimate" to  
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21 <sup>2</sup> In the Ninth Circuit, when the Appeals Council specifically  
22 considers new materials in the context of denying the claimant's  
23 request for review, "we consider the rulings of both the ALJ and the  
24 Appeals Council." *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9<sup>th</sup> Cir.  
25 1993); *Gomez v. Chater*, 74 F.3d 967, 971 (9<sup>th</sup> Cir. 1996). The record  
26 on review includes the ALJ's decision as well as the new evidence.  
27  
28

1 reject Dr. French's conclusions.<sup>3</sup> *Benecke*, 379 F.3d at 592  
2 (treating physician's contradicted opinion is given more weight than  
3 that of a non-examining physician and can be rejected only with  
4 specific and legitimate reasons); *Fair v. Bowen*, 885 F.2d 597 (9<sup>th</sup>  
5 Cir. 1989)(a treating physician opinion is given special weight).

6 The ALJ correctly found the medical evidence supports the  
7 finding of a severe impairment that could reasonably be expected to  
8 cause the pain reported. (Tr. 23.) The record shows Plaintiff  
9 sought treatment for her knee problems consistently over the years  
10 and was compliant with treatment recommendations to the extent they  
11 did not cause her additional pain (Tr. 309); she attempted to return  
12 to work and live a normal life, but was unsuccessful due to pain and  
13 aggravation of her condition. (Tr. 18.) Treatment notes and  
14 physical therapy records throughout the record evidence short term  
15 success in conservative treatment, adverse side effects of physical  
16 therapy and prescribed medications, complications with surgeries,  
17 and consistent reports of pain, all of which appear consistent with  
18 Dr. French's conclusions. (See, e.g., Tr. 194, 211, 213, 237, 240,

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20 <sup>3</sup> Dr. French's opinion is contradicted by the findings of  
21 reviewing physician Norman Staley, M.D., dated January 26, 2005.  
22 (Tr. 282-89.) However, Dr. Staley is neither an examining medical  
23 source nor an orthopedic specialist; therefore, his opinions are  
24 given less weight than those of Dr. French. *Benecke*, 379 F.3d at  
25 592. It is also noted his opinions are based on medical evidence  
26 that pre-dates Dr. French's 2005 treatment notes and conclusions.  
27 (Tr. 289, 300-02, 342-43.)

1 243, 290, 301-02, 309, 311.)

2 Medical equivalence must be based on medical findings in the  
3 entire record. 20 C.F.R. §§ 404.1526, 416.926. Plaintiff's claim  
4 of medical equivalence is being asserted based on the longitudinal  
5 medical record, which is substantial and technical, and opinions  
6 from acceptable medical sources. The record includes imaging  
7 reports and treatment notes from orthopedic specialists, Plaintiff's  
8 primary physician, and the physical therapy providers. Even  
9 assuming the ALJ's reasoning that Plaintiff's subjective complaints  
10 are not entirely credible is "clear and convincing," Plaintiff's  
11 statement that she had problems with stairs and could not walk on  
12 uneven surfaces is supported by evidence from two orthopedic  
13 specialists and Plaintiff's treating physician:<sup>4</sup> Dr. Jones, Dr. Kym  
14 and Dr. French. (Tr. 194, 237, 344, 619.) The ALJ clearly credited  
15 these opinions and Plaintiff's statements because the RFC  
16 determination indicates she is restricted in climbing stairs and  
17 should avoid walking on uneven surfaces. (Tr. 22.)

18 The ALJ's rejection of Dr. French's opinion that Plaintiff  
19 meets Listing 1.02 is not supported by specific and legitimate  
20 reasons. It is noted on independent review, however, that Dr.  
21 French's opinions regarding "subluxation" and imaging findings are  
22 incomplete (Tr. 342), and the technical reports from specialists and  
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24 <sup>4</sup> The Commissioner gives more weight to medical specialists'  
25 opinions about medical issues relating to their area of speciality  
26 than to a medical source who is not a specialist. 20 C.F.R.  
27 §§ 404.1513 (d)(5), 416.927(d)(5).  
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1 the various imaging results in the record are not sufficiently  
2 explained in the record or in the ALJ's decision to allow adequate  
3 review by this court of the ALJ's step three findings. Consistent  
4 with the Commissioner's policy, the services of a medical expert are  
5 necessary to explain and interpret the medical record for step three  
6 purposes. 20 C.F.R. §§ 404.1527(f)(2)(iii), 416.927(f)(2)(iii); SSR  
7 96-6p.

8 As directed by the Commissioner in his policy ruling, the  
9 medical evidence in its entirety should be reviewed by a medical  
10 expert to determine whether Plaintiff's knee condition and obesity  
11 in combination met Listing 1.02 at any time during the claimed  
12 period of disability, and if so, the medical expert should use his  
13 or her expertise to infer an onset date. SSR 96-6p; SSR 83-20.<sup>5</sup>  
14 Because it is not clear from the record whether Plaintiff is  
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16 <sup>5</sup> The onset date represents the date upon which Plaintiff is  
17 disabled and, therefore, eligible for benefits. The establishment  
18 of the onset date is especially critical in Title II (DIB) cases,  
19 because it may affect whether Plaintiff is eligible for past earned  
20 benefits, and if so, the amount she can be paid. See SSR 83-20.  
21 Where disability is caused by a distinct trauma, and medical  
22 documentation is available to establish the date of trauma and  
23 severity of impairment, the Commissioner may base a finding of onset  
24 on evidence from acceptable medical sources. *Id.* However, in  
25 progressive diseases, such as degenerative disk disease, the date of  
26 onset is frequently unclear, and inferences must be made to  
27 establish this critical finding. *Id.*

1 entitled to disability benefits based on the Listings, remand for  
2 further proceedings is appropriate. Accordingly,

3 **IT IS ORDERED:**

4 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is  
5 **GRANTED** and the matter is remanded to the Commissioner for  
6 additional proceedings consistent with this decision, including, but  
7 not limited to, medical expert testimony and new step three  
8 findings.

9 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is  
10 **DENIED**.

11 3. Application for attorney fees may be filed by separate  
12 motion.

13 The District Court Executive is directed to file this Order and  
14 provide a copy to counsel for Plaintiff and Defendant. Judgment  
15 shall be entered for **Plaintiff**, and the file shall be **CLOSED**.

16 DATED October 6, 2010.

17  
18 S/ CYNTHIA IMBROGNO  
19 UNITED STATES MAGISTRATE JUDGE  
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